IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 536

MAX E. GREENBERG,

Petitioner,

—against—

AMERICAN SURETY COMPANY OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

It is stated in the brief for the respondent that this Court has determined that Congress may impose a complete prohibition against payment of attorney's fees from appropriated funds or general funds of the client as a condition of the grant of relief.

Reference is made in respondent's brief to *Calhoun vs. Massey*, 253 U. S. 170, in support of such statement. That case upheld a *limitation* in the amount of fees which might be paid to the attorney but did not cover a situation in which Congress prohibited the payment of *any* attorney's fees whatever.

As stated in our petition for certiorari (p. 15), this Court has never determined the question as to whether

Congress may prohibit the payment of *any* fee whatever to an attorney for legal services concededly necessarily required and rendered in the preparation and presentation of a claim. Not only has this Court never decided such question but no other State or Federal Court within the research of the petitioner has construed or applied an act banning the payment of any fee whatever to an attorney except *Davis* vs. *Commonwealth*, 164 Mass. 241, 41 N. E. 292, cited in our petition for certiorari, in which recovery was allowed to the attorney.

So, the other cases cited in the respondent's brief, to-wit, *Capital Trust* vs. *Calhoun*, 250 U. S. 208, *Sutherland* vs. *New York & Baltimore Transportation Lines*, 43 Fed. Supp. 94, S. D., N. Y., 1941, affirmed on opinion below, 125 Fed. 2d 551 (2d Circuit, 1942) and *Nesbit* vs. *Frederick Snare Corporation*, 96 Fed. 2d 535, (C. A. P. D. C., 1938), certiorari denied, 305 U. S. 608, all involved only *limitations* as to the amount which could be paid to an attorney.

It is conceded in the respondent's brief (p. 4) that the cases cited involved the *limitation* of the amount rather than the prohibition against payment of *any* fee. It is contended by respondent, that the same does not constitute a valid distinction.

We submit that there is a clear and powerful distinction between the cases where Congress recognized the obligation to an attorney and provided for payment of what it deems a reasonable fee as against a situation, such as here, where Congress prohibited any payment whatever, any contract to the contrary notwithstanding.

Respondent in its brief (pp. 5-6) quotes from the discussion in the Senate, the statement of Senator Hendrickson that "if the facts before the Committee as to the services rendered were clear, I am sure the Committee would allow a reasonable, legal fee." (100 Congressional Record 8221)

Counsel for respondent in his brief (p. 6) makes the wholly unwarranted and indeed malicious statement that the petitioner was derelict in his duty in failing to disclose to the Committee his contract for a contingent fee and any services he had rendered, and that his failing to do so not only led the Committee to proscribe any payment to petitioner, but that petitioner also put his client in criminal jeopardy if it compensated him since payment in violation of the Act is a misdemeanor.

The fact is no notice of the contemplated action of the Committee was ever given the petitioner, so that there was no opportunity for petitioner to inform the Committee as to the legal work performed or as to his contract with respondent. In fact, the question was raised by Senator Morse as to the procedure for notice to attorneys, and he was advised by Senator Hendrickson that the Committee was working on rules for such procedure. The discussion was as follows (100 Congressional Record, p. 8221):

> "Senator Morse: But there are cases in which very valuable service is rendered and for which the lawyer is entitled to a fee * * *.
>
> "My question is this: Does the Committee before it finally passes on a bill of this kind, serve notice on the lawyer that if he has a claim for

a fee he should submit his claim? If we prohibit the charging of a fee, will we be confronted—and of course we desire to do equity in some instances by a lawyer who may say, 'I have a claim for myself and I want to get another bill through in order to collect a fee which I think, in all fairness, I should be allowed to collect?' Could we not short cut that sort of thing by serving notice that if a lawyer has such a claim he should have his claim on file?

"Mr. Hendrickson: I am glad the senator asked that question. There has been a special subcommittee appointed of which the junior Senator from New Jersey is chairman. We are in the course of working with the staff on a series of firm rules establishing formulas to govern the whole subject, both as to the claims and as to the fees. That work has not yet been completed."

In further answer to the unfounded statement of respondent's counsel that the petitioner was derelict in his duty toward the respondent, there are the admitted allegations in the complaint that the respondent and its co-insurers are ready and willing to make payment to the petitioner out of their general funds if it is legal for them to do so and that they do not even desire to accept payment for the lost coupons unless they may legally pay the petitioner for services rendered by him (39, 42).

We respectfully submit that the Act of Congress prohibiting any payment to petitioner for legal serv-

ices necessarily required and rendered violates the Fifth Amendment to the Constitution, and that the petition for certiorari to review the determination of the Courts of the State of New York holding to the contrary should be granted.

Respectfully submitted,

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